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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD J. SINNOTT,
PETITIONER,

v.

CHARLES A. RADIN, STATE-BOSTON RETIREMENT BOARD, THOMAS W. GATELY, LOUISE DAY HICKS, NEWELL COOK, BRIAN LEAHY, HAROLD J. CARROLL AND KEVIN H. WHITE
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether Branzburg v. Hayes, 408 U.S. 665 (1972) should be re-examined in the context of a judgment of contempt in a civil action against a non-party "investigative" reporter who obtained information which was under governmental control and not available to the public generally from confidential sources.

2. Whether requiring a non-party "investigative" reporter to appear and and answer questions at a deposition in a civil action abridges the freedom of speech and press guaranteed by the First Amendment.

3. Whether refusing to compel a non-party reporter to answer questions relating to persons previously deposed which may impeach or contradict the

testimony of such persons abridges a litigant's interest in obtaining evidence necessary to prove his claim and the public interest in the fair administration of justice guaranteed under the Fourteenth Amendment.

PARTIES TO THE PETITION

The petitioner is Richard J. Sinnott, the plaintiff in a civil action now pending before the trial court of the Commonwealth of Massachusetts entitled "Richard J. Sinnott v. State-Boston Retirement Board et al.", Suffolk Superior Court docket number 54952 ("the Superior Court action"), and the appellee in the appeal of Charles A. Radin from a judgment of contempt decided on June 13, 1988 by the Supreme Judicial Court of the Commonwealth of Massachusetts, docket

number S-4754 ("the appeal").

The respondents are Charles A. Radin ("Radin"), a non-party witness in the Superior Court action, and the appellant in the appeal, and the State-Boston Retirement Board, Thomas W. Gately, Louise Day Hicks, Brian Leahy, Harold Carroll, and Kevin H. White, all of whom are defendants in the Superior Court action and designated as appellants in the appeal.

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The petitioner, Richard J. Sinnott, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts described below.

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts reversing the judgment of contempt entered against the respondent Charles A. Radin was decided on June 13, 1988 and has been reported at 402 Mass. 581 (1988). A copy of the opinion appears in the Appendix to this petition.

JURISDICTION

The order of the Supreme Judicial

Court of the Commonwealth of Massachusetts, a state court of last resort, was entered on June 13, 1988. This petition for certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Rule 17 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the First and Fourteenth Amendments to the Constitution of the United States and Massachusetts General Laws c. 4, §7, clause twenty-sixth, c. 66, §10 and c. 214, §1B. Being lengthy, these provisions are set forth in the Appendix filed herewith.

STATEMENT OF THE CASE

Pre-Appeal

The petitioner, Richard J. Sinnott ("Sinnott"), filed the Superior Court action on May 14, 1982. The action arose from the disclosure of information contained in Sinnott's application for a disability pension which he had filed with the State-Boston Retirement Board ("the Retirement Board"). The information was disclosed to the respondent Radin, a reporter for The Boston Globe.

The defendants in the Superior Court action are the State-Boston Retirement Board ("the Retirement Board"), Thomas W. Gately ("Gately"), Louise Day Hicks ("Hicks"), Newell Cook ("Cook")

(individually and as they were members of the Retirement Board), Brian Leahy ("Leahy") (individually and as he was Executive Officer of the Retirement Board), Harold Carroll ("Carroll") (individually and as he was Corporation Counsel for the City of Boston), and Kevin H. White ("White") (individually and as he was Mayor of the City of Boston).

In Count I of the complaint in the Superior Court action, Sinnott alleges invasion of privacy in violation of G.L. c. 214, §1B; in Count II, Sinnott alleges a violation of G.L. c. 214, §3B (which establishes a cause of action for disclosure of personal data by a holder thereof); and in Count III, Sinnott alleges a violation of 42 U.S.C. §1983,

asserting that the disclosure of information concerning his application for a disability pension was a reprisal for articles written by Sinnott concerning the respondent White and his administration in violation of his rights under the First and Fourteenth Amendment to the Constitution of the United States.

Following entry of the action and service of the defendants, the parties commenced the discovery phase of the litigation through interrogatories, document requests and depositions.

On August 27, 1985, Sinnott first subpoenaed Radin to attend a deposition and to produce documents relating to an article written by Radin which appeared in The Boston Globe on April 5, 1982 and which included selected excerpts from

Sinnott's application and accident statement filed with the Retirement Board. On October 1, 1985, Radin filed a Motion to Quash the subpoena. In the motion Radin first asserted the issues relating to Sinnott's status as a public official, to the viability of the cause of action and to the First Amendment interests in the free flow of information.

After service of the subpoena on Radin on September 23, 1985, the defendants filed Motions for Summary Judgment raising the same or similar issues to those raised by Radin in his Motion to Quash, particularly issues with respect to whether the complaint stated a cause of action upon which relief could be granted. After hearing, on June 11,

1986, the defendants' Motions were denied. On July 11, 1986, in the Memorandum of Decision and Order on Defendants' Joint Motion for Summary Judgment (Sullivan, J.P.J.), the court stated that it was not prepared to rule as a matter of law that the facts disclosed did not rise to the degree of intimate, personal facts which would support a cause of action. The court further stated:

> Additionally, the fact that plaintiff maintained a position in the public eye should not deprive him of the same confidential treatment that all public employees applying for a pension should receive and which appeared to be the Board's policy. It would appear that the information disclosed to the press constitutes medical or medically-related information sufficient to create a genuine, triable issue.

Radin's Motion to Quash was heard and, on July 16, 1986, denied "without prejudice to seek protective relief if appropriate when the deposition is in progress".

Radin was deposed on July 31, 1986. Radin refused to answer a number of questions during his deposition, including questions relating to persons previously deposed.

On July 31, 1986, Sinnott filed a Motion to Compel Radin's testimony. Sinnott asserted inter alia that, in applying a balancing test, at the very minimum Radin should be compelled to answer questions concerning persons previously deposed who had denied or

effectively denied[1] either being a source of the information or knowing who was. Sinnott further asserted that compelling Radin to so testify would provide impeachment evidence and avoid allowing discovery to become a "game of hare and hounds".

Radin filed a renewed Motion to Quash or for a Protective Order asserting inter alia that the complaint failed to state a claim upon which relief could be granted, that the interests in protecting Radin's pledge of confidentiality outweighed Sinnott's interest in

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[1] For the purposes of this petition, the two deponents who invoked their Fifth Amendment privilege are considered as having effectively denied being Radin's sources in light of representations made by their counsel to the trial court.

discovery, and that Sinnott had not exhausted alternative sources.[2]. The motions were heard simultaneously on August 6, 1986. On August 8, 1986, the court (Morse, J.) allowed Radin's renewed motion and prohibited the taking of a further deposition of Radin except on order of the court "and an adequate showing that the plaintiff is not able to obtain this discovery by other means ...."

On August 8, 1986, Sinnott filed a Motion for Reconsideration. While that motion was pending, the plaintiff resumed discovery.

On December 5, 1986, the court

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[2] See Memorandum and Order dated December 6, 1986 which is reproduced in the Apendix.

(Morse, C.J.) issued Findings of Fact, Rulings of Law and Order on Plaintiff's Motion to Compel Discovery (a copy of which is included in the Appendix) denying the same. In doing so, the court engaged in a balancing of the public interest in every person's evidence and the public interest in protecting the free flow of information, concluding that the Motion to Compel should be denied.

Following the order of December 5, 1986, Sinnott continued discovery, taking additional depositions and moving (unsuccessfully) to compel testimony of two deponents who had invoked their Fifth Amendment privilege and refused to testify.

All of those deposed who testified denied having disclosed the information

to Radin and denied knowing who did. Most of the defendants claimed they first learned of the application when they read the Radin article. Another defendant, by contrast, had claimed that there were rumors about the application all over City Hall. Many witnesses claimed a failure of memory when asked if they knew who had disclosed the information to Radin.

On September 29, 1987 after having conducted depositions of twenty-seven persons[3], Sinnott filed his Motion to Vacate Orders of August 8, 1986 and December 5, 1986 and to Compel the

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[3] Sinnott had at this time deposed all persons identified in answers to interrogatories by the Retirement Board as having access to the Sinnott application. See Supreme Judicial Court opinion, n. 2.

Deponent Charles A. Radin to Answer Certain Questions.[4] Radin objected to the allowance of the motion, asserting grounds similar to those advanced in the prior Motion for a Protective Order which had been allowed on August 8, 1986. That motion was denied by the trial court (Morse, C.J.) on November 23, 1987.

On November 27, 1987, Sinnott filed an interlocutory petition in the Appeals Court, the intermediate appellate court for the Commonwealth, seeking relief from

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[4] In support of the Motion, Sinnott filed certain exhibits: Exhibit 1, Questions proposed to be Answered by Radin; Exhibit 2, Transcript of Deposition of Radin; Exhibit 4, Depositions Taken by the petitioner; Exhibit 5, Excerpts of Deposition Testimony, as well as a 30 page Offer of Proof detailing the discovery done and the information obtained as a result of that discovery.

the order of November 23, 1987, Docket No. 87-0673-CV ("the Appeals Court petition"). After hearing, the Appeals Court petition was allowed by the Single Justice (Perretta, J.) who stated that she could not "discern any public interest to be served by protecting the 'free flow' of information to which the public has, at best, limited and restricted access." The Superior Court order dated November 23, 1987 was reversed and the matter was remanded to the Superior Court for the entry of a new order requiring Radin to "answer those twenty-eight questions set out in Exhibit 1 to the plaintiff's motion of September 29, 1987."[5] A copy of the Memorandum of

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[5] The first twenty-seven questions related to individuals who had been deposed, asking Radin in each

the Appeals Court Justice is set forth in the Appendix.

Sinnott moved to implement the order of the Single Justice. The motion was allowed by the court (Sullivan, J.P.J.) over Radin's objection on February 10, 1988.

Radin was deposed on February 18, 1988 pursuant to the February 10, 1988 order and he refused to answer each and every question set forth on Exhibit 1 attached to the order of February 10, 1988.

On February 18, 1988, Sinnott moved for sanctions against Radin for his

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instance whether the individual had been a source of the information concerning Sinnott. The twenty-eigth question asked for the identity of Radin's sources if all of the answers to the preceding questions were negative.

refusal to comply with the order. On February 18, 1988, the court (Sullivan, J.P.J.) adjudicated Radin in civil contempt and ordered him incarcerated until such time as he should comply with the order of February 10, 1988.[6]

Appeal

Radin appealed from the judgment of civil contempt entered against him on February 18, 1988. The appeal was entered in the Appeals Court for the Commonwealth. Thereafter, the Supreme Judicial Court acting sua sponte transferred the appeal to that court for direct appellate review.

In the appeal, issues relating to the balancing of the public interest to

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[6] That order was stayed pending an expedited appeal.

every person's evidence and the asserted interest in the free flow of information, incorporating arguments previously made in the trial court and before the Single Justice of the Appeals Court, were argued by both parties, as well as by amicus curiae.

The appeal was argued on April 7, 1988 and decided on June 13, 1988. The Supreme Judicial Court found that it was not improper for the trial court to consider the potential damage to the free flow of information which might result from compelled disclosure and the investigative purpose of and the public interest in Radin's use of confidential sources. The order holding Radin in contempt was reversed.

Factual Background

The Retirement Board administers the retirement system for employees of the City of Boston. Applications for job related disability pensions are filed with the Retirement Board and processed by the disability section. The Retirement Board requires that an accident statement be filed with an application for a disability pension.

Access to disability files was limited. It was the policy and practice of the Retirement Board not to release any information concerning either pending or completed applications for disability pensions to anyone except to employees who had responsibility for processing the application. Prior to the incident here in issue, no applications, pending or

press without the consent of the applicant. Any disclosure of the contents of a pending disability application required a vote of Board members.

In 1982, Sinnott had been employed by the City of Boston for approximately twenty-two (22) years. In the later years, he served as the Chief of the Licensing Division of the Office of the Mayor. On February 17, 1982, Sinnott received notice of his termination effective two weeks later.

A reorganization of the Licensing Division had caused dissention between then Mayor Kevin H. White and Sinnott. According to Radin, Sinnott who had been out sick for long periods during the year preceding his termination "was involved

in a bitter City Hall turf fight with White's licensing commissioner, Joanne Prevost ... ."

In addition to his position in the City, Sinnott was a columnist writing for a number of local newspapers. Sinnott was described by Radin as being "widely known as a fiery conservative columnist" who "often has used his columns to attack Mayor Kevin H. White's administration ... ." According to George K. Regan, Jr. ("Regan") then press secretary to White, Sinnott wrote articles "detrimental to the City of Boston."

On February 26, 1982, Sinnott filed his disability pension application and accident statement with the Retirement Board. In the application, Sinnott sought a stress related disability. In

the accident statement, Sinnott described not only events which had occurred while he was Chief of Licensing but also the effect that those incidents had on him emotionally.[7] The Sinnott application was filed with and processed by the disability section of the Retirement Board.

On March 28, 1982, The Boston Globe published an article by Radin and Stephen Kurkjian entitled "Ex-ward boss' city pension" which related to a disability pension awarded to Robert Toomey ("the Toomey article"). In that article, it

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[7] In its opinion, the Supreme Judicial Court incorrectly states that the application related to the emotional impact of Sinnott's attendance at concerts "in his capacity as 'city censor'", a position Sinnott had previously held in the City.

was reported that Toomey gave "reporters access to his otherwise confidential file with the retirement board." The article also detailed Toomey's political associations with Mayor White and Theodore Anzalone, then an attorney for the Retirement Board.

On April 5, 1982, Radin's article entitled "Hub city clerk, ex-censor file for disabilities". In the article, Radin quoted at length from the accident statement filed by Sinnott. Unlike the Toomey article, the information concerning the Sinnott application and accident statement was attributed to unidentified "sources" and "city hall sources".

According to Radin, those sources, i.e. persons having first-hand knowledge,

provided the information to him on the express condition that Radin not reveal their names.

Sinnott was first contacted the night before publication of the article and is reported to have stated, "I have an attorney handling this. I thought all of this was supposed to be confidential."

There was no vote of the Retirement Board members authorizing disclosure of the Sinnott application to Radin. All members and officials of the Retirement Board who had been deposed denied disclosing or authorizing the disclosure of the contents of the Sinnott application to Radin.

By letter dated April 23, 1982, Sinnott, noting that his application had been given to a member of the media,

withdrew his disability pension application stating that he did so "because of the misuse that was made of the application."

Following the Sinnott article there, were a number of further articles published by The Boston Globe on the Retirement Board and disability pension system, including articles about reform proposals advanced by the defendant White which would "open applications for disability pensions to greater public examination." With the exception of the Sinnott article which related to two pending applications, the articles published related to persons receiving disability pensions.

REASONS FOR GRANTING WRIT

I. **In ruling that the trial court was warranted in considering the potential damage to the free flow of information, the Supreme Judicial Court has departed from the decisions of this Court which have uniformly held that the First Amendment does not guarantee the press a greater right of access to governmental information than that afforded to the public generally.**

This Court has not ruled that the First Amendment guarantees the press a right of special access to information within the control of the government greater than that afforded the public generally. Branzburg v. Hayes, 408 U.S. 665, 684 (1972); Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978). In Pell v. Procunier, 417 U.S. 817, 834 (1974) and in Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974), the decision holding

that the press and media had no constitutionally protected special right of access to prisons was based upon the assumption that the First Amendment does not guarantee the press special access to governmental information. See Houchins v. KQED, Inc., 438 U.S. at 10.

Although the Court has stated that "news gathering is not without its First Amendment protections," Branzburg v. Hayes, 408 U.S. at 707, that dicta "in no sense implied a right of access to news sources." Houchins v. KQED, Inc., 438 U.S. at 10. That observation was made in Branzburg in response to a claim advanced that compelling a reporter to disclose confidential information to a grand jury would violate the First Amendment by deterring confidential sources from

disclosing information. Id. at 10-11.

The decision of the Supreme Judicial Court which is the subject of this petition was made in the context of a judgment finding a so-called "investigative" reporter in contempt for refusing to answer questions during a deposition after an order issued directing him to do so. The answers to those questions would result in the reporter's disclosing the identity of sources of information concerning the petitioner which had been disclosed to the reporter, Radin.

As in Branzburg, the reporter asserted protection under the First Amendment and the potential damage to public's interest in the free flow of information and the deterrent effect of

compelled disclosure on the news-gathering process. However, the information which had been disclosed to the reporter had been within the control of a governmental board and it was not available to the public generally. That information had not been disclosed through resort to statutory procedures available under Massachusetts law, G.L. c. 66, §10, but rather it was disclosed surreptitiously by unidentified confidential sources.

In reversing the judgment of contempt, the Supreme Judicial Court considered the validity of the order that had entered in the trial court on November 23, 1987 whereby the trial court refused to compel the reporter, Radin, to answer twenty-eight specific questions

set forth in the Appendix at A40.[8] In so doing, the Supreme Judicial Court held that the trial court "was warranted in balancing Sinnott's need for the information against possible damage to the free flow of information" and that it was proper for the trial court "to consider the investigative purpose of and public interest in Radin's use of confidential sources." See A16-A17, citing Von Bulow v. Von Bulow, 811 F.2d 136, 142-143 (2d Cir.), cert. den. sub nom. Reynolds v. Von Bulow, 107 S.Ct. 1891 (1987), quoting Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), cert. den.

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[8] That order had been reversed by a subsequent order of a Single Justice of the Appeals Court. See Appendix, A22.

411 U.S. 966 (1973).[9]

The Supreme Judicial Court decided the case in terms of abuse of discretion by the trial court. Although the order of November 23, 1987 had been reversed by a Single Justice of the Appeals Court, the Supreme Judicial Court did not review the order of the Single Justice as such but did note distinctions between the order of the trial court and the order of the Single Justice. See A2.

What distinguishes the order of the trial court from that of the Single Justice is more than a mere difference in

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[9] Neither the Von Bulow case (which related to notes taken during the Von Bulow's criminal trial) nor Baker (which related to information furnished by a real estate agent) involve information maintained by a governmental entity which is not available to the public generally.

the exercise of discretion. The order of the trial court is founded upon the premise that there is a public interest in protecting the free flow of information of the type in issue, i.e. information not available to the public generally, information which as a matter of policy and practice had not been disclosed in the past. By contrast, as the Supreme Judicial Court noted "the single justice's own balancing of the asserted interest led her to conclude that she could not 'discern any public interest to be served by protecting the 'free flow' of information to which the public has, at best, limited and restricted access." A11-A12. In so concluding the Single Justice had relied upon state law, G.L. c. 4, §7 twenty-

sixth (c) and G.L. c. 66, §10, as construed in Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983).[10]

If the principles Branzburg v. Hayes, supra., and Houchins v. KQED, Inc., supra. are controlling, the premise upon which the exercise of discretion by

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[10] In Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983), the court resolved a controversy between the Retirement Board and The Boston Globe which arose when the Board refused to release information concerning completed pension applications to the newspaper. The Court held that the medical certificates relied upon by the Board in granting disability pensions were exempt from mandatory disclosure under state law, G.L. c. 66, §10(b) and G.L. c. 4, §7 twenty-sixth (c). The court stated that it saw no distinction between the medical certificate and the application which described the injury and basis for the application stating "our reasoning applies with equal force to the application." Id., n. 23.

the trial court was based is inconsistent with those principles. If the press has no constitutionally protected right of access to information not available to the public generally, it is an error of law to consider the impact of compelled disclosure on the free flow of information to which the press has no right of access.

In holding that the trial court was warranted in considering the potential damage to the free flow of information under these circumstances, the Supreme Judicial Court has departed from the decisions of this Court. This Court has not addressed the question of protections available (if any) under the First Amendment where the reporter is a so-called "investigative" reporter as

distinguished from other reporters.

The impact of the decision of the Supreme Judicial Court extends beyond the action of Sinnott v. State-Boston Retirement Board et al. The use of confidential sources by so-called investigative reporters has flourished in the post-Watergate era. In some instances, the information "leaked" is in the public domain. However, in other instances the information is private and not subject to disclosure. In light of the decision of the Supreme Judicial Court, there is a need to clarify the principle that the First Amendment does not guarantee a special right of access to governmental information and to resolve the inconsistency created by the decision of the Supreme Judicial Court.

If the information disclosed is not available to the public generally, consideration of the potential damage to the free flow of information undermines the rule that the First Amendment does not guarantee reporters rights of special access to restricted information. There is a need for a determination by this Court whether the public has a greater interest in protecting information not available to the public generally from wrongful, unauthorized disclosure which is superior to any assertion of damage to the free flow of such information.

Guidelines from this Court are necessary to avoid a situation where individual public officials or employees are free to establish ad hoc standards according to their own ideas of what

should be disclosed to reporters regardless of state law to the contrary. If reporters can be exempted from providing evidence concerning the identity of confidential sources who have disclosed information not available to the public generally, laws, regulations and rules restricting access to governmental information would be undermined.

The manner of disclosure in this case is particularly important to a consideration of the First Amendment implications. Massachusetts has an established statutory procedure under G.L. c. 66, §10 for obtaining access to governmental information. It was that procedure which had been followed in the case of Globe Newspaper Co. v. Boston

Retirement Board, supra.

In Massachusetts, a person seeking access to governmental information can challenge a refusal to release the information. Such a challenge would require a balancing between the seriousness of any invasion of privacy and the public's right to know. Attorney General v. Collector of Lynn, 377 Mass. 151 (1979) citing Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818-819 (1978). It has been held that in analyzing any claim of exemption from disclosure, the public's right to know should prevail "unless disclosure would publicize 'intimate details' of a 'highly personal nature'." Attorney General v. Assistant Commissioner of Real Property, 380 Mass.

623, 626 (1980). State law clearly contemplates a review prior to disclosure even in those cases where a public official or employee may be involved. Such review was by-passed in this case.

"The constitution itself is neither a Freedom of Information Act nor and Official Secrets Act." Stewart, "Or of the Press," 26 Hastings LJ 631, 636 (1975) quoted in Houchins v. KQED, Inc. supra. at 14. The decision of the Supreme Judicial Court raises significant First Amendment issues which require that this Court balance the competing interests of an individual's expectation that governmental information will be disclosed according to established principles and not on the basis of a unilateral decision of an individual

employee or reporter. Review by this Court is necessary to ensure that the press and media, particularly those designated as "investigative" reporters, are not viewed as being best qualified to discover and expose alleged malfeasance in public institutions without the necessity of affording affected individuals with the fundamental substantive and procedural protections which lie at the foundation of an orderly government. See Houchins v. KQED, Inc., supra. at 14; Garland v. Torre, 259 F.2d 545, 549 (2d Cir.) cert. den., 358 U.S. 910 (1958).

II. The fair administration of justice requires that a litigant be afforded an opportunity to obtain impeachment evidence and the First Amendment considerations

should not be construed to frustrate that principle.

This case also raises issues concerning the public interest in the fair administration of justice and the right of a litigant to obtain evidence necessary to establish his claim. "'(T)he public has a right to every man's evidence,' except for those persons protected by a constitutional, common law or statutory privilege...." Branzburg v. Hayes, 408 U.S. at 688.

Massachusetts does not have a shield law establishing a reporter's privilege. The Supreme Judicial Court "has consistently held that there is no constitutionally based reporter's privilege (either qualified or absolute) under either the First Amendment or art.

16 [of the Declaration of Rights to the Constitution of the Commonwealth]." Petition for the Promulgation of Rules, 395 Mass. 164, 171 (1985).

Massachusetts, like other states, has a statute which protects persons against "unreasonable, substantial or serious interference with his privacy." G.L. c. 214, §1B. The statute has been interpreted to proscribe "required disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate countervailing interest." Cort v. Bristol-Myers Co., 385 Mass. 300, 307-308 (1982). Sinnott has relied upon this statute in seeking redress from the courts of the Commonwealth for the unauthorized disclosure of his pension

application.

To establish his claim, Sinnott must prove that the disclosure was made, that the disclosure related to "facts ... of a highly personal or intimate nature Cort v. Bristol-Myers Co., supra., that the disclosure was unreasonable and that the defendants in the action were legally responsible for the disclosure.

The Superior Court action has been pending for six years. It has not languished. Rather, there have been extensive pre-trial proceedings which include not only discovery and depositions but also motions for summary judgment. There has been a decision of the trial court denying summary judgment wherein it was held that there are triable issues of fact.

Much of the discovery has related to obtaining evidence concerning the identity of the sources of the information in the Sinnott application to determine whether those sources include the defendants or whether the defendants were otherwise involved in the disclosure. Twenty-seven individuals have been deposed during thirty-nine sessions.

In Garland v. Torre, 259 F.2d supra. cited with approval in Branzburg v. Hayes, supra., two CBS executives who had allegedly induced the publication of libellous remarks were deposed and denied making the remarks or knowing who did. Thereafter, the reporter was deposed. His claim of privilege to refuse to disclose the identity of his sources was

rejected. The Court stated at p. 549:

> If ...the freedom of the press ... is here involved it too must give place under the Constitution to a paramount public interest in the fair administration of justice. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

"The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." United States v. Nixon, 418 U.S. 683, 709 (1974).

"(A) subpoena has never been treated as an invitation to a game of the hare and hounds in which the witness must testify only if cornered at the end of the chase." United States v. Bryan, 339 U.S. 323, 331 (1950).

The course of discovery in the Superior Court action has been a game of the hare and hounds, a game of "catch me if you can". The candor of the deponents (at least of certain of them) is perhaps best reflected in Radin's argument in his reply brief filed with the Supreme Judicial Court wherein at p. 19 Radin argued that the First Amendment considerations in the case are so compelling that the Court should disregard the fact that witnesses may have lacked the candor to assume responsibility for their conduct. Loosely translated that suggests "acceptable perjury". Although the Supreme Judicial Court glosses over the question of "acceptable perjury", it has previously held that a news reporter has

"a duty to reveal perjury, when the knowledge that such an act has been committed is based solely on confidential information." Matter of Roche, 381 Mass. 624, 630 (1980).

The relationship between a reporter and his source is a confidential one and thus secretive. Particularly in a civil action, where the identity of a source is at issue (as it is in this case[11]), there

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11 The Supreme Judicial Court asserted that there was a "lack of a clear demonstration of reasons for a need to know the precise identity of Radin's sources." A17-A19. By contrast, the Single Justice concluded that Sinnott had "shown a real need for the information". A34. In the Complaint filed in the Superior Court action, Sinnott alleged that the defendants Gately, Hicks, Cook and Leahy wrongfully permitted persons not authorized by law to gain access to the information in issue. Complaint ¶21. It was also alleged that the defendants Carroll and White wrongfully and knowingly caused the disclosure of the information in issue. Non-consensual

is an inherent risk that, as suggested by Radin, a source will lack the courage to assume responsibility for his conduct by falsely testifying. That risk may be a calculated one where the source has obtained a promise of confidentiality and he knows that the reporter will refuse to disclose his identity and resist any attempts to compel him to disclose his identity. A review of the depositions testimony which is replete with memory lapses, denials and inconsistencies demonstrates that risk is more than a mere possibility in this case.

The order compelling Radin to

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disclosure has been held sufficient to constitute a violation of G.L. c. 214, §1B. Bratt v. International Business Machines Corp., 392 Mass. 508, 518 (1984).

testify was limited to twenty-eight questions. Twenty-seven of those questions specifically related to persons who had been deposed and who had denied or, by virtue of their claim of privilege, effectively denied disclosing the information in issue to Radin or knowing who did.

In these circumstances, holding the First Amendment interest in protecting the free flow of information superior to the public interest in obtaining every person's evidence undermines the fundamental right of a plaintiff to obtain evidence necessary to prove his claim and undermines the public's interest in the fair administration of justice.

The Superior Court action is

concededly in the discovery phase. "A lawsuit, it has been well said, 'is not a sporting event, and discovery is founded upon the policy that the search for the truth should be aided.'" McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972) citing Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958).

Any claim of First Amendment protection should not be permitted to frustrate that search for truth or to suggest that there is acceptable perjury. A litigant's search for the truth through the judicial process may very well be a two edged sword. In seeking redress in the courts, a litigant may very well be forced to address and rebut counter-allegations such as those asserted in this case by Radin and by the defendants.

However, the allegations and counter allegations can only be resolved by a full and fair assessment of all relevant facts and circumstances presented at a trial on the merits. The First Amendment should not be used by litigants or by "investigative" reporters to frustrate that search for truth.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court.

Respectfully submitted,

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